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No. 73-712

In the Supreme Court of the United States

OCTOBER TERM, 1973

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

MERCEDES ORTIZ BERMUDEZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Secretary of Agriculture and other federal defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported. The opinion of the district court (Appendix C, *infra*) is reported at 348 F. Supp. 1279. The order of the district court is set forth in Appendix D, *infra*.

[1] Should the instant petition be granted as well as our pending petition in *Butz* v. *Carter*, No. 73-546, it would seem appropriate to consolidate the two cases for argument.

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JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on October 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Whether food stamp beneficiaries have an implied remedy against participating States for retroactive food stamp benefits withheld as a result of unaccountable failure by a State to carry out its issuance responsibilities under the Food Stamp Act.

2. Whether participating States are indispensable parties in an action under a cooperative federal-State program predicated on allegations of State administrative error.

STATUTES AND REGULATIONS INVOLVED

1. Sections 4(a) and (c) of the Food Stamp Act of 1964, as amended, 7 U.S.C. 2013(a) and (c), and relevant provisions of Food and Nutrition Service Instructions, are set forth in the Secretary's petition in *Butz* v. *Carter*, No. 73–546, pp. 2–4.

2. Sections 271.1(n)(1) and 271.1(o)(5) of the Food and Nutrition Service regulations, 7 C.F.R. 271.1 (n)(1) and 271.1(o)(5), provide:

> (n) *Notice of adverse action.* (1) Prior to any action to terminate or reduce a household's program benefits within the certification period, each State agency shall:
>
> (i) Give the household at least 15 days advance notice of any such action;
>
> (ii) Give in detail the reasons for the proposed action;

(iii) Explain the household's right to request a hearing and the circumstances under which program participation is continued if a hearing is requested; and

(iv) Indicate the State agency's willingness to schedule a conference if the household wishes to discuss the action.

(o)(5) If a hearing request is made during the 15-day advance notice period, provided for in paragraph (n) of this section, and the issue is solely one of fact or judgment, participation shall be continued on the basis existing immediately prior to the notice of adverse action until the hearing decision is rendered.

STATEMENT

Respondents Bermudez and others, residents of New York and Connecticut, are heads of households participating in the food stamp program. They brought this action in the district court on July 31, 1972, to compel the Secretary of Agriculture to grant them and their class retroactive credits for food stamps which, through alleged administrative error of the State administering agencies of New York and Connecticut, were not issued to them during various months in 1971 and 1972. The plaintiffs complained not only of unaccountable State failure to make emergency issuances of food stamps (in cases of inadvertent terminations)—the situation in *Butz* v. *Carter,* petition for certiorari pending, No. 73-546—but also unaccountable State failure to keep beneficiaries on food stamp benefits pending a hearing (in cases of inten-

tional or proposed termination), in violation of the applicable regulations, 7 C.F.R. 271.1(n)(1), 271.1(o)(5).

As in *Butz* v. *Carter*, the Secretary urged that the liability in question (if there indeed was unaccountable State error) should be borne by the States, not the federal government, and moved to dismiss on the ground that the relevant State agencies were indispensable parties under F. R. Civ. P. 19. The district court rejected this motion and ordered nationwide class relief against the federal government in favor of "all persons who have been wrongfully denied food stamp entitlements and have asked for a fair hearing after the filing of this suit" (App. D, *infra*, p. 31). The class relief was stayed pending appeal.

The Secretary on appeal urged that, under the implied remedy doctrine of *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, and related cases, the States should bear the liability for unaccountable failure to issue stamps, in order to effectuate their statutory responsibility to issue the stamps on time (thus avoiding liability); and that, accordingly, the relevant State agencies (New York and Connecticut) were indispensable parties to the suit, particularly where the facts as to the alleged non-issuance of stamps were within their knowledge and control, and were not within the knowledge or control of the Secretary of Agriculture.

The court of appeals affirmed the district court, relying on the general federal obligation to fund the program (App. A, *infra*, pp. 17–20), without discussion of the implied remedy doctrine of *Sullivan* and

related cases.[2] The States were not considered indispensable parties under the test set forth in *Provident Bank* v. *Patterson*, 390 U.S. 102 (App. A, *infra*, pp. 20–21). Nationwide class relief was considered appropriate (*id.* at pp. 21–23).,

REASONS FOR GRANTING THE WRIT

1. We incorporate as reasons for granting a writ of certiorari in this case, on the issue of implied relief against the States, the reasons set forth in the Secretary's petition for certiorari in *Butz* v. *Carter*, No. 73–546, at pp. 10–14, 18–19.[3] The basic facts in this case differ from *Carter* only in that the relevant States (New York and Connecticut) allegedly ignored not only the Secretary's emergency issuance instructions, but also the express regulatory requirements that beneficiaries be notified of proposed action to terminate benefits and that they be kept on food stamp benefits pending a requested hearing on proposed termination. 7 C.F.R. 271.1(n)(1), 271.1(o)(5). The dispositive legal issue—applicability of the implied remedy doctrine of *Sullivan* v. *Little Hunting Park*, 396 U.S. 229—is the same in both cases. In *Bermudez*, however, the issue has immediate nationwide significance, since nationwide class relief against the federal government was ordered. That breadth of relief will foreclose any further judicial consideration of the question of implied *State* liability, in the absence of

[2] Unlike the Third Circuit in *Carter* v. *Butz*, the court of appeals in *Bermudez* placed no reliance on the doctrine of State sovereign immunity (App. A, *infra*, p. 19).

[3] We have served copies of that petition on counsel in this case.

review by this Court, or special remedial legislation by Congress.

As stressed in the *Carter* petition (p. 18), the ruling of the court of appeals in *Bermudez* means that, absent specific congressional consideration of the problem, States can, with practical impunity, disregard any administrative or statutory command under the Food Stamp Act. In our view, neither the prospective injunctive power of a district court nor the administrative threat of a total cut-off of Food Stamp benefits, 7 U.S.C. 2019(f), is a practicable remedy for unaccountable State failure to carry out its responsibility to make a timely issuance of food stamps.[4] Only the carefully molded monetary remedy against the State urged here by the Secretary, and applicable in each case where there is unaccountable failure by the State to carry out its issuance responsibility, will work to remove the underlying administrative problems giving rise to these cases.

Such a remedy would make effective the congressional purpose that food stamps be issued on time, and, to that extent, would of course reduce ultimate State liability. The courts not only have the power, but also the duty, "to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433.

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[4] Contrary to the suggestion of the court of appeals (App. A, *infra*, p. 19), the present requirement of a State-financed hearing to determine factual disputes, cannot realistically serve as an effective incentive to the State to avoid late issuance situations.

The States cannot properly object to liability which arises only if they fail to carry out their voluntarily-assumed responsibility with diligence and good faith. Cf. *State* v. *Grand Forks County*, 71 N.D. 355, 362–363, 300 N.W. 827, 831. At least, they cannot claim a complete license to disregard that responsibility without any effective accountability. Yet, in this case, the court below held that under no circumstances can an implied monetary remedy be imposed against the States under the Food Stamp Act, without specific congressional authorization of such relief. The court ruled that "effective administration of governmental programs * * * cannot and should not be used as a device to shift primary responsibility for benefits * * *" (App. A, *infra*, p. 19). This conclusion ignores the fact that the State can avoid any liability by performing its obligations, and that the general federal funding of the program cannot cure local break-downs. We submit that the ruling below is inconsistent with the principles announced in the *Sullivan* line of cases, and in comparable cases under State or private law which have imposed liability on intermediate agencies where necessary to effectuate the latters' responsibility.[5]

2. If there is State liability, the States are obviously indispensable parties. But we submit that the States are necessary parties to this litigation even if they do not bear ultimate financial liability. Thus, it may well

[5] See, *e.g.*, *Walker Bank & Trust Co.* v. *First Security Corp.*, 9 Utah 2d 215, 341 P.2d 944; *Biakanja* v. *Irving*, 49 Cal. 2d 647, 320 P.2d 16; *Miller* v. *Reading*, 369 Pa. 471, 87 A.2d 223; *State* v. *Grand Forks County*, 71 N.D. 355, 362–363, 300 N.W. 827, 831.

be that the plaintiffs' right to retroactive benefits arising out of a failure to issue stamps depends on their making a prompt demand (*e.g.*, a timely request for an emergency issuance or hearing) [6] and the States' default thereafter. If so, their claims require factual development which cannot be provided by any party other than the administrators of the issuance process—here the States, not the federal government. 7 C.F.R. 2019(b).[7] In these circumstances any determination that "in equity and good conscience the action should proceed" in the absence of the States—the test of the States' indispensability under F. R. Civ. P. 19(b)—cannot stand.

The question of indispensability of the States in cases involving claims under cooperative federal-state

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[6] For example, plaintiff Avila's food stamp benefits were cut off in March 1971 (App. A, *infra*, p. 11, n. 1), but, by her own admission, she did not bring her problem to the attention of the State agency until October 1971 (Ct. App. Appendix, p. 25). The courts below did not answer the question whether she, and others similarly situated, are entitled to retroactive credits for the period prior to a request for reinstatement, *i.e.*, whether the cut-off of benefits prior to such time would be "wrongful" for purpose of obtaining retroactive benefits for such period.

[7] The court of appeals' assumption that the federal government knows the actual number of beneficiaries whose food stamps have been improperly withheld by the States (App. A, *infra*, p. 21), has no basis on this record or in fact.

programs was not resolved by this Court's decision in *Provident Bank* v. *Patterson, supra,* which dealt with a totally unrelated situation. Nor will that issue be decided in *Butz* v. *Carter* (petition pending, No. 73–546), where the State agency (Pennsylvania) was joined. Thus, unless review is granted here, the important question of joining State agencies in these cases—regardless of their monetary liability—will remain. We submit that the decision below, in this respect, places an intolerable burden on the federal government.[8]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

OCTOBER 1973.

[8] We have served the States of New York and Connecticut, through their respective Attorneys-General. They are, of course, free to submit their views under the Rules of the Court, should they be so advised.

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2138

MERCEDES ORTIZ BERMUDEZ, ET AL

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE, EARL L. BUTZ, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided October 10, 1973

Michael Kimmel, Attorney, Department of Justice with whom *Harold H. Titus, Jr.*, United States Attorney and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief, for appellants. *John A. Terry*, and *Robert M. Werdig, Jr.*, United States Attorneys, also entered appearances for appellant.

Ronald F. Pollack, with whom *Roger A. Schwartz* and *John R. Kramer* were on the brief, for appellees.

Before BAZELON, *Chief Judge,* MACKINNON, *Circuit Judge and* VAN PELT,* *Senior United States District Judge* and for the District of Nebraska

Opinion for the Court filed by *Senior District Judge* Van Pelt.

VAN PELT, *Senior District Judge:* This is an action brought by welfare recipients to adjudicate their rights under The Food Stamp Act of 1964, *as amended,* 7 U.S.C. §§ 2011 *et seq.* (1970). The defendants are the United States Department of Agriculture, the Secretary of the United States Department of Agriculture, the Administrator of the Agriculture Department's Food and Nutrition Service, and the Food Stamp Division Director of the Agriculture Department's Food and Nutrition Service. The plaintiffs are welfare recipients in New York and Connecticut who, through State administrative error, have been denied participation for varying periods in the food stamp program.[1] Specifically the

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] The plaintiffs are:

Carmen Avila (Connecticut). Avila was a participant in the food stamp program whose income for herself and her four children was derived entirely from public assistance grants. Because of administrative error she was not sent any food stamps between March 1971 and December 1971. In January 1972, after a fair hearing, her food stamp benefits were reinstated. However, no retroactive benefits were allowed.

Mercedes Ortiz Bermudez (New York). Bermudez was a participant in the food stamp program and was entitled to purchase $126 worth of food stamps every month for $94, thus saving $32 a month. In January 1972 her food stamp benefits were terminated due to administrative error and were not reinstated until April 16, 1972,

plaintiffs, having won fair hearing determinations that benefits were wrongfully withheld, challenge the policy

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despite numerous efforts to have them reinstated. When these benefits were restored she was not granted retroactive adjustments.

Kathy White (New York). White and her daughter were entitled to $60 worth of food stamps every month. On March 1, 1972, her A.F.D.C. payments, which were her sole source of income, were cut off. However, her food stamp benefits were not, even though she could not afford to participate in the program. Her A.F.D.C. payments were reinstated after a fair hearing on April 14, 1972, but her food stamp benefits were cut off from May 15, 1972 to June 15, 1972. These were later also reinstated. The plaintiff seeks retroactive benefits from March 15, 1972 to June 15, 1972.

Loretta Holby (Connecticut). The Holby household consisted for a time of herself, her seven children, and her mother. However, she received a food stamp allotment for only seven persons. During a periodic review she was informed that she was "underbudgeted" and that she should be receiving more benefits. However, shortly thereafter her food stamp benefits were terminated from February 1, 1972 to February 16, 1972, and again from June 1, 1972 to June 16, 1972. During this period of time her mother moved out of the household. This plaintiff seeks to recover for increased benefits for the period for which she was underbudgeted and also seeks to recover the retroactive benefits which were denied.

Carmen Diaz (Connecticut). Diaz and her five children participated in the food stamp program and received $144 worth of food stamps for $104. From February 16, 1972 to May 16, 1972 she did not receive any food stamps due to administrative error partly brought about because she changed residences. Although she was reinstated she was denied retroactive benefits.

Michael Hinchey (Connecticut). Through error his monthly income of $133.30 was stated to be $170.82; thus he was charged $46 a month for food stamps worth $88 rather than the $33 a month he should have been

of the food stamp program [2] which refuses to permit retroactive food stamp benefits to welfare recipients who have been denied their right [3] to participate in the food

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charged. Hinchey's complaint is that he was overcharged for the food stamps that he received rather than that he was denied participation in the program. It appears that Hinchey's particular problem is covered by 7 C.F.R. § 271.1(q) (1973). This regulation provides that households which have been overcharged for their food stamps are entitled to be compensated to the extent that they were overcharged. Thus it appears that Hinchey is entitled by the federal government's own regulation to recover his extra expense and is not a proper party to challenge the policy in question here.

Apart from Hinchey all of the other plaintiffs are proper parties to bring this action and are proper parties to represent the class in attacking the challenged policy.

[2] The policy of the federal government is embodied in an instruction of the Federal Nutritional Service, FNS Instruction 732-14 IV-D, which provides: "Past food consumption cannot be increased or otherwise altered. Therefore, following the hearing decision, retroactive adjustments in favor of the household shall not be permitted."

[3] It is settled that the plaintiffs as well as all others who meet the eligibility requirements have a *right* to participate in the food stamp program and are entitled to recover for the benefits which were wrongfully withheld from them. *See Stewart v. Butz*, 356 F.Supp. 1345, 1348-49 (W.D. Ky. 1973), where the court said:

> "The Food Stamp Act of 1964, Title 7 U.S.C. § 2011 et seq., was enacted by Congress to provide federal funds to permit low-income families to purchase a nutritionally-adequate diet. The Congress thereby created a *statutory right* for those low-income families who meet certain minimum national standards of eligibility. The old rule of law that such welfare benefits were a mere privilege or gratuity that could be withdrawn at will by government has been totally discredited. The landmark Supreme Court case of Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) elevated welfare benefits,

stamp program. Plaintiffs seek declaratory and injunctive relief against the implementation of this policy. In addition the plaintiffs seek to prosecute this suit as a class action under Rule 23 of the Federal Rules of Civil Procedure and seek a nationwide order which would, in effect,[3] grant retroactive benefits to "all impoverished persons in the nation who are denied retroactive food stamp adjustments although food stamps had been wrongfully withheld from them due to administrative error." Plaintiffs claim jurisdiction is based on 28 U.S.C. §§ 1331, 1332, 1337, 1361 and 5 U.S.C. § 702. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202.

The district court,[4] after examining the legislative scheme of the food stamp program, held that the policy of denying retroactive benefits violated the purposes of the Food Stamp Act and that the federal defendants were liable for food stamp benefits which had previously been erroneously denied. The district court also held that the relief was to take the form of forward adjustments[5]

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including food stamps to a position of *legal right* and statutory entitlement, rather than mere privilege. Accord: Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)."

The defendants do not dispute the plaintiffs' right to retroactive benefits. Rather the basic controversy involved is who is responsible for these retroactive adjustments.

[4] *Bermudez v. United States Department of Agriculture*, 348 F.Supp. 1279 (D.D.C. 1972).

[5] As defined by the district court:

"Forward adjustments mean that each member of the class is issued an adequate number of stamps per month at no cost until he recovers the excess money spent for food when stamps were withheld. Thus, if a hypothetical recipient had received a monthly allotment of $100 worth of food stamps at a cost of $20, he was receiving $80 worth of food at no cost. If wrongly denied stamps for

rather than stamps issued retroactively. In addition, the district court held that the action was properly denominated a class action.[6] The class action aspect of the decision was stayed by the order of two circuit judges.

The issues before this court on appeal are: 1) Whether the federal government should be liable for retroactive adjustments or whether the State which wrongfully denied the food stamp benefits should be held liable; 2) Whether the State administrative agencies and officials are indispensable parties to this action; 3) Whether the district court properly denominated this a class action. Before proceeding with a discussion of these issues, a brief summary of the Food Stamp Act and the food stamp program is necessary.

The Food Stamp Act was passed in 1964 to "safeguard the health and well-being of the Nations [sic]

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one month, plaintiff has lost $80, which can be amortized over a period of four months by giving plaintiff the next four months worth of food stamps at no cost per month." 348 F.Supp. at 1281.

As the district court noted, this manner of relief eliminates the potential black market developing from a potential windfall of stamps issued retroactively. This form of relief has also been held appropriate in *Tindall v. Hardin*, 337 F.Supp. 563 (W.D. Pa. 1972), *aff'd sub nom. Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973); *Stewart v. Butz*, 356 F.Supp. 1345 (W.D. Ky. 1973).

[6] The district court in its order filed on October 27, 1972, ordered:

> "federally-reimburseable retroactive food stamp benefits, through forward adjustments, to all persons who have been wrongfully denied food stamp entitlements and have asked for a fair hearing after the filing of this suit, in the full amount that has been wrongfully denied, and also to all persons who henceforth are wrongfully denied food stamp entitlements in the full amounts that are wrongfully withheld."

population and raise levels of nutrition among low-income households." [7] The program is designed to operate in the normal channels of trade. Its basic operation is relatively simple. A low-income household, which is eligible, is charged a certain amount of money depending on the amount of income and the number of persons in the household,[8] and in return receives food stamp coupons of a greater face value than the amount paid. These stamps are then redeemable at participating retail stores at their face value and are used to obtain a nutritionally adequate diet. The program is administered at the national level by the Food and Nutrition Service of the United States Department of Agriculture. In order for a household to be eligible for the program it is necessary for the State in which the household resides to participate in the program. Participation by each State is voluntary. If a State decides to participate, the certification of eligible households and payment for and issuance of the food stamp coupons is handled by local State agencies.[9] The Secretary of the United States Department of Agriculture establishes national uniform standards of eligibility for some households.[10] Other standards of eligibility are established by local State agencies.[11]

As for the financial aspects of the program, the Food Stamp Act provides that: "Coupons issued and used as provided in this chapter shall be redeemable at face value by the Secretary [of Agriculture] through the facilities of the Treasury of the United States." [12] The Act also

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[7] 7 U.S.C. § 2011 (1970).

[8] 7 U.S.C. § 2016(b).

[9] 7 U.S.C. § 2019(b).

[10] 7 U.S.C. § 2014(b).

[11] 7 U.S.C. § 2019(e).

[12] 7 U.S.C. § 2013(a).

provides that: "Funds derived from the charges made for the coupon allotment shall be promptly deposited . . . in a separate account maintained in the Treasury of the United States for such purpose." [13] In addition, "Coupons issued pursuant to this chapter shall be deemed to be obligations of the United States within the meaning of section 8 of Title 18." [14] Finally the Act also provides that Congress shall appropriate funds to cover the cost of the program,[15] to wit, the difference between the amount received for the food stamp coupons and the face value of the stamps. Each State which participates in the program is made responsible for financing out of its own funds the administrative costs which it incurs in carrying out its duties under the Act.[16] In addition, the Act provides that:

> "If . . . there has been gross negligence or fraud on the part of the State agency in the certification of applicant households, the State shall upon the request of the Secretary deposit into the separate account authorized by section 2016 of this title, a sum equal to the amount by which the value of any coupons issued as a result of such negligence or fraud exceeds the amount that was charged for such coupons under section 2016(b) of this title." [17]

From an examination of these provisions it is clear that Congress intended for the federal government to be responsible for the cost of the benefits or "bonus" portion of the program, to wit, the difference between the face value of the coupons and the amount that the low-income households pay for their coupons. It is likewise clear that the administrative costs of certification and distribu-

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[13] 7 U.S.C. § 2016(d).

[14] 7 U.S.C. § 2023(d).

[15] 7 U.S.C. § 2025(a).

[16] 7 U.S.C. § 2024(a).

[17] 7 U.S.C. § 2019(g).

tion are to be borne by the participating States. Other courts faced with the same problem of statutory interpretation have so held. *Tindall v. Hardin*, 337 F. Supp. 563 (W.D. Pa. 1972), *aff'd sub nom. Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973); *Stewart v. Butz*, 356 F. Supp. 1345 (W.D. Ky. 1973).

It is true that the States are liable to the federal government for additional expenses which the federal government incurs as a result of errors or fraud in certification or in undercharging recipients for food stamps.[18] However, this case does not involve liability for additional expense incurred by the federal government. This case involves benefits for which the federal government is responsible but which were not paid out earlier. This statutory provision cited in note 18 may well limit State liability for substantive benefits to the instances enumerated therein. That question we do not need to determine in this case.

The defendants argue that even assuming that the States are liable only for administrative expenses that the cost of retroactive food stamp benefits is an administrative expense since the question of retroactive benefits would never have arisen had there been no State administrative errors. Although at first glance this argument appears to have weight, a closer examination shows that it is entirely without merit. The fact that benefits were denied by the States to needy recipients does not make the cost of their retroactive adjustments an administrative expense. Retroactive adjustments, by their very nature, do not add to the budgeted expense of operating the program. It is merely expense which through error is delayed in its final payment.

The defendants also argue that if liability for retroactive benefits due to administrative errors is not placed

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[18] 7 U.S.C. § 2019(g); 7 C.F.R. § 271.7 (1973).

upon the States that the States will not have any incentive to effectively administer the program. While the problem of effective administration of governmental programs is a legitimate concern of both the Congress and the States, it cannot and should not be used as a device to shift primary responsibility for benefits under the food stamp program. An examination of the Act, as pointed out above, discloses that the federal government is responsible for the benefits under the food stamp program.[19] The States have an incentive to carefully administer the Act since they must finance any fair hearings which are requested by recipients who feel that they were wrongfully terminated. If the Congress feels that the States need a stronger incentive in order to assure efficiency in their administration of the program, it can so provide by amending the Act.

The defendants also argue that the court in *Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973), a case dealing with this same problem, erroneously relied upon the doctrine of sovereign immunity in determining that the federal government rather than the States were liable for retroactive benefits. However, this argument is not persuasive. To the extent that sovereign immunity was relied on by the Court of Appeals for the Third Circuit it was that the Food Stamp Act did not create a cause of action for the welfare recipients against the State based on negligence. In any event this court does not base its decision upon any sovereign immunity which the State may possess but rather upon the fact that the statute creating the federal right clearly shows a congressional intent to hold the federal government liable for all the benefit costs of the food stamp program.

We hold that the federal government is liable for retroactive food stamp benefits. Every other court which

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[19] See notes 12 to 15 and accompanying text, *supra*.

has dealt with the question is in agreement. *Tindall v. Hardin*, 337 F.Supp. 563 (W.D. Pa. 1972), *aff'd sub nom. Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973); *Stewart v. Butz*, 356 F.Supp. 1345 (W.D. Ky. 1973).

The defendants also contend that the States involved here, New York and Connecticut, are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and since they were not joined as defendants that the action should be dismissed.[20] The district court held that the States failed to meet the standards for indispensability imposed by the Supreme Court in *Provident Tradesmen Bank & Trust Company v. Patterson*, 390 U.S. 102 (1968), and that joinder of the States was not warranted. In the *Provident* case the Supreme Court raised the following question in determining whether joinder was necessary: "Can the decree be written so as to protect the legitimate interests of the outsiders and if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?" [21]

In this action the plaintiffs seek to adjudicate their rights vis-a-vis the federal government and request recission of federal policy. The order of the district court met the requirements set forth in *Provident*. The order was sufficient to meet the plaintiffs' needs. The interests of the States were protected as no liability was imposed on them. Only the federal defendants were held responsible for retroactive benefits. The district court

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[20] In the other two suits which have proceeded to judgment on this issue, *Tindall v. Hardin*, 337 F. Supp. 563 (W.D. Pa. 1972), *aff'd sub nom., Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973); *Stewart v. Butz*, 356 F.Supp. 1345 (W.D. Ky. 1973), the respective states which had wrongfully denied the benefits through administrative error were made parties to the suits. However, in both of these suits the federal government was held to be liable for the retroactive adjustments.

[21] 390 U.S. at 112.

noted correctly that the defendants' argument as to the indispensability of the States assumed the strength of its case on the merits. We find that the federal defendants and not the States are liable, and hence there is no such strength.

Finally, the plaintiffs seek to prosecute this action as a class action with a nationwide class. To hold each State an indispensable party would require that each State participating in the food stamp program be joined as a party. In view of our decision on the merits, this is as unnecessary as it would be unwieldy.

The plaintiffs urge that a class action is necessary in order to implement a uniform nationwide policy of retroactive adjustments. The plaintiffs contend that there are 11 million persons in the nation who are participating in the food stamp program. They do not describe how many of them have been wrongfully denied participation in the food stamp program and are entitled to retroactive adjustments. Probably this number is known only to the defendants. Neither of the other two cases involving responsibility for retroactive food stamp adjustments which have gone to judgment have given the nationwide relief sought in this action. In *Tindall v. Hardin*, 337 F.Supp. 563 (W.D. Pa. 1972), the district court did not allow that action to proceed as a class action partly because it felt that the federal government would voluntariiy rescind the policy that is the basis of this suit and partly because it felt that the precedential value of the judgment would make a class action unnecessary. Neither of these hopes have been fulfilled. On appeal the Third Circuit upheld this determination as within the discretion of the trial court although it hinted that it might have decided otherwise. In *Stewart v. Butz*, 356 F.Supp. 1345 (W.D. Ky. 1973), the court in ordering retroactive food stamp benefits allowed the action to proceed as a class action and ordered relief to "All Food

Stamp recipients in the Western District of Kentucky who, having won 'fair hearing' determinations that their food stamps were wrongfully withheld, have been denied retroactive benefits by the federal government." [22] This did not have the effect of nationwide relief.

The district court, as noted above, determined that this was properly a class action.[23] On review we are aware that: "The question of whether to allow a suit to proceed as a class action is one primarily for the determination of the trial judge. If he applies the correct criteria to the facts of the case, the decision should be considered to be within his discretion." *Gold Strike Stamp Company v. Christensen*, 436 F.2d 791, 792-93 (10th Cir. 1970). *See also, City of New York v. International Pipe and Ceramics Corporation*, 410 F.2d 295, 298 (2d Cir. 1969). Keeping this standard of review in mind, we conclude that the class action determination by the district court should be upheld. In order to proceed as a class action the four requirements of subsection (a) of Rule 23 of the Federal Rules of Civil Procedure must be met. The district court specifically so found.[24] In addition, the plaintiffs must meet one of the requirements established under subsection (b) of Rule 23. Here it is clear that the defendants have failed to grant retroactive adjustments to all those who have won fair hearing determinations that they were wrongfully denied participation in the food stamp program. Thus, the subsection (b) (2) requirement of Rule 23 has been met.

Nevertheless, defendants argue that the class action determination limits the needed discretion of the Secretary of Agriculture in administering the food stamp

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[22] 356 F.Supp. at 1354.

[23] See note 6, *supra*.

[24] 348 F.Supp. at 1280.

program. The plaintiff class was described by the trial court in such a way that they are all entitled to adjustments. Thus it would follow that the Secretary could not lawfully regulate otherwise and his discretion is in no way impaired.

Since the class action determination was within the discretion of the district court and the proper criteria was applied, the decision is affirmed. The stay granted pending the outcome of this appeal is dissolved.

For the reasons stated above the judgment of the district court is affirmed in all respects.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 72–2138

MERCEDES ORTIZ BERMUDEZ, ET AL.

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE EARL L. BUTZ, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

September Term 1972 (Civil Action 1531–72)

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, *Chief Judge,* MACKINNON, *Circuit Judge,* and VAN PELT,* Senior United States District Judge for the District of Nebraska.

*Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

JUDGMENT

Filed October 10, 1973

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment ---------- of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date, and the stay granted pending the outcome of this appeal is dissolved.

Per Curiam

For the Court:
HUGH E. KLINE,
Clerk.

Date: October 10, 1973.

Opinion for the Court filed by Senior District Judge Van Pelt.

APPENDIX

United States District Court for the District of Columbia

MERCEDES ORTIZ BERMUDEZ, ET AL., PLAINTIFFS

v.

U.S. DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

Filed October 5, 1972

(Civil Action No. 1531–72)

Memorandum Opinion and Order

Plaintiffs challenge the federal food stamp program policy of refusing to issue retroactive stamps to eligible households wrongly denied stamps due to administrative errors. The federal food stamp program has had a turbulent history. Retroactive benefits have been alternately denied by two administrative instructions and reinstated by a statutory amendment, administrative regulations, and finally by a federal court order.[1] Plaintiffs ask that this issue be finally resolved by permanently enjoining the federal policy and declaring it unconstitutional.

[1] The first Food and Nutrition Service Instruction 732–14, IV–D (May 28, 1970) denied retroactive benefits; in January, 1971, a statutory amendment provided for "the granting of a fair hearing and a prompt determination thereafter, to any household aggrieved by the action of a state agency * * *" (7 U.S.C. Sec. 2019(e)(6)). In April, 1971, the federal government attempted to implement regulations expressly authorizing retroactive benefits lost due to administrative error (see 36 Fed. Reg. 7244; 7 C.F.R. Sec. 271.1) These regulations forced the states to pay for retroactive benefits, and they were never im-

Plaintiffs act for themselves and for the class of impoverished persons who, having won "fair hearing" determinations that stamps were wrongly withheld, have been consistently denied retroactive benefits pursuant to Food and Nutrition Instruction 732–14, Sec. V–D. In each case, deprivation of food subsidies for periods of several months denied plaintiff households nutritionally adequate diets and/or forced them to incur substantial debt from attempting to afford both adequate food and household necessities. These consequences persist despite plaintiffs' reinstatement to the food stamp rolls, leaving some households with a malnourished child and others forced to use money intended for food to repay a burgeoning debt. This cause is certified as a class action, having met the requirements of Rule 23, Federal Rules of Civil Procedure, and being further warranted by the need for the federal defendants to implement a uniform policy nationwide.[2]

After a hearing on the motion for injunctive and declaratory relief and opposition thereto, and consideration of plaintiffs' motion for summary judgment, the Court enters the following order and memorandum

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plemented allegedly because the states complained of being financially unable to carry that burden. Regulations promulgated in July, 1971, deleted all reference to retroactive benefits; and in September, 1971,, defendants issued the FNS Instruction 732–14, Sec. V–D, challenged in this action. On January 18, 1972, in *Tindall* v. *Hardin*, 337 F.Supp. 563 (W.D. Pa., 1972) this Instruction was enjoined as to the plaintiffs only and not to their class in that action.

[2] The class, estimated to be in the thousands, is so numerous as to make joinder impracticable. There are questions of law and fact common to the class and the claims of the representative parties are typical of the class. Finally, the representative parties will fairly and adequately protect the interests of the class.

opinion which shall constitute final findings of fact and conclusions of law.

The irreparable harm to the plaintiff class is conceded by both parties to this action, and the only remaining issues are whether plaintiffs have a right to be made whole and, if so, who bears that responsibility.

On the latter point, the government argues that the states are responsible for paying for retroactive stamps and because of the failure to join them as indispensable parties, this action should be dismissed under Rule 19, Federal Rules of Civil Procedure. The gravamen of this argument is that the states, as exclusive administrators of the program, assume the costs of administrative expenses, one of which is retroactive stamps. The government makes the additional argument that any other arrangement would be inconvenient since local errors can only be investigated locally. The Court finds, however, that joinder is not warranted. The states fail to meet the standard for indispensability set in *Provident Bank* v. *Patterson,* 390 U.S. 102 (1968), i.e., that the action cannot proceed without the states and still provide the relief due without impairing the interest of those absent. The present action merely adjudicates the rights of plaintiffs vis a vis the federal defendants, and requests only rescission of a federal policy. Further, a decree for relief can obviously be drafted so as to protect any interest the states might have. In any event, the argument for joinder assumes the strength of the government's case on the merits, i.e., that the states are liable for retroactive stamps. However, the Court holds that the federal defendants are liable for retroactive relief due the affected class. The most persuasive support for this holding is the fact that the Food Stamp Act shows a congressional intent to have program benefits paid by the federal government and a portion of the administrative expenses paid by the states. (7 U.S.C. 2023,

(d), 2024, 2025). The District Court in *Tindall* v. *Hardin*, 337 F. Supp. 563, recognized this intention in the program's operation:

> The coupons are accepted at face value by grocery concerns approved to participate in the plan, and are eventually redeemed at face value by the federal government.

There is little merit to the argument that retroactive stamps are an administrative cost, since it is quite clear that they represent a budgeted expenditure inadvertently saved through administrative error. Further, making forward adjustments would eliminate defendants' concern over a potential black market developing from the windfall of stamps issued retroactively.[3]

The federal policy of denying retroactive benefits violates the purposes of the Food Stamp Act,[4] and its

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[3] Forward adjustments mean that, for the same cost, each member of the class is issued a greater number of stamps per month, but no more than actually needed for food that month. Thus, if a hypothetical recipient had received a monthly allotment of $100 worth of food stamps at a cost of $20, he was receiving $80 worth of food at no cost. If wrongly denied stamps for one month, plaintiff has lost $80, which can be amortized over a period of four months by giving plaintiff the next four months worth of food stamps at no cost per month. see *Torez* v. *Roberts*, S.D. Fla., September 20, 1972, Case No. 72–1300 Civ-JE.

[4] The Act provides that since "limited food purchasing power of low income households contributes to hunger and malnutrition among members of such households * * * a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet * * *" P.L. 91–671, 84 Stat. 2084, 7 U.S.C. 2011, 2013(a). See *Moreno* v. *U.S. Department of Agriculture*, D.C.D.C. May 26, 1971, Civ. Action No. 615–72.

The federal eligibility standard creates a class to whom stamps must be issued and the standard can only be altered

grant of a fair hearing to those aggrieved by government action. 7 U.S.C. 2019(e)(6). Plaintiffs' statutory entitlement cannot be denied without due process. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Clearly, the sham hearing provided, one which plaintiffs cannot win, falls far short of fifth amendment requirements.

Counsel will present an appropriate order in accordance with this opinion.

JOHN LEWIS SMITH, JR.,
United States District Judge.

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by Congress itself. *Townsend* v. *Swank*, 40 U.S. 282 (1971); *Carleson* v. *Remillard*, 40 U.S.L.W. 4224 (June 7, 1972); *Russo* v. *Kirby*, 335 F. Supp. 123 (E.D.N.Y., 1971).

APPENDIX D

United States District Court for the District of Columbia

MERCEDES ORTIZ BURMUDEZ, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

Filed October 27, 1972

(Civil Action No. 1531–72)

Order

After reading the complaint, motions, affidavits, exhibits, memoranda of law, and after hearing arguments in open court, the Court this 26th day of October, 1972, ORDERS AND DIRECTS:

That the defendants, their agents, employees and successors in office, are enjoined from implementing, or causing to be implemented, Food and Nutrition Service Instruction 732–14, § V–D.

That the defendants, their agents, employees and successors in office, are enjoined from denying, or causing to be denied, federally-reimburseable retroactive food stamp benefits, through forward adjustments, to all persons who have been wrongfully denied food stamp entitlements and have asked for a fair hearing after the filing of this suit, in the full amount that has been wrongfully denied, and also to all persons who henceforth are wrongfully denied food stamp entitlements in the full amounts that are wrongfully withheld.

That the defendants, their agents, employees and successors in office, are enjoined from denying, or causing to be denied, federally-reimburseable retroactive food stamp benefits through forward adjustment, to the named plaintiffs and their class for the benefits wrongfully withheld from them.

That forward adjustments for wrongly denied benefits shall be administered by the defendants in the following manner: The recipient's usual food stamp purchase price shall be reduced by whatever amount necessary, during as many stamp purchase periods as are necessary, to provide full restitution to the recipient within the fewest number of stamp purchase periods. Thus, if a recipient is normally entitled to a monthly allotment of $100 worth of food stamps at a cost of $20, and has been wrongfully denied stamps for a one month period, he would receive the next four months worth of food stamps at no cost per month.

That the defendants shall immediately inform the States of this Order and shall immediately promulgate regulations in compliance with this Order.

That the United States Marshal shall serve a copy of this Order forthwith upon the defendants.

JOHN LEWIS SMITH, JR.,
United States District Judge.

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